

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

WESLEY E. TROGLIA,	)	
	)	No. CV-09-00057-JPH
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant.	)	
	)	
	)	

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BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on October 2, 2009. (Ct. Rec. 13, 16). Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Benjamin J. Groebner represents the Commissioner of Social Security ("Commissioner"). Plaintiff filed a reply brief on September 17, 2009. (Ct. Rec. 18.) The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 16) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 13).

**JURISDICTION**

Plaintiff protectively filed applications for disability insurance benefits (DIB) and supplemental security income (SSI) on January 17, 2007, alleging disability due to heart problems,

1 syncope, obesity, gastroesophageal regurgitation disorder (GERD),  
2 chest and back pain, numbness in the arms and legs, hypertension,  
3 depression, antisocial personality disorder, and polysubstance  
4 abuse in remission. (Tr. 61,64,73, 111-113,119-  
5 123,144,175,177,180.) Both applications allege onset as of  
6 January 7, 2007. (Tr. 111, 119.) The applications were denied  
7 initially and on reconsideration. (Tr. 65-72, 74-77.)

8 At a hearing before Administrative Law Judge (ALJ) Paul  
9 Gaughen on November 18, 2008, plaintiff, represented by counsel,  
10 medical expert Rueben Beezy, M.D., and vocational expert Deborah  
11 LaPoint testified. (Tr. 30-60.) On December 24, 2008, the ALJ  
12 issued an unfavorable decision. (Tr. 15-27.) The Appeals Council  
13 denied Mr. Troglia's request for review on February 20, 2009.  
14 (Tr. 1-3.) Therefore, the ALJ's decision became the final  
15 decision of the Commissioner, which is appealable to the district  
16 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action  
17 for judicial review pursuant to 42 U.S.C. § 405(g) on March 2,  
18 2009. (Ct. Rec. 2, 4.)

#### 19 **STATEMENT OF FACTS**

20 The facts have been presented in the administrative hearing  
21 transcript, the ALJ's decision, the briefs of both plaintiff and  
22 the Commissioner, and are briefly summarized here.

23 Plaintiff was 43 years old at the time of the hearing. (Tr.  
24 38.) He went to the tenth grade, earned a GED, and attended  
25 college at night for four years but did not earn a degree. (Tr.  
26 39-40.) Plaintiff has past relevant work as a landscaper and  
27 foreman, fast food worker and supervisor, hotel maintenance  
28 worker, chop saw operator, grinder, and electronics inspector.

(Tr. 36-37, 51-52.) His heartbeat feels irregular with increased stress. Plaintiff can walk two and a half blocks, sit an hour and twenty minutes, stand one hour, and lift five pounds. Plaintiff has pain in his left leg and lower back; he rests six times a day for 30-45 minutes (Tr. 41-45.) He watches television, draws, paints, whittles, and visits with family. (Tr. 46,49.) Plaintiff stopped drinking a little over a year before the hearing, and he quit using drugs six years before the hearing. He suffers six headaches a week. (Tr. 47.)

#### SEQUENTIAL EVALUATION PROCESS

The Social Security Act (the "Act") defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a Plaintiff shall be determined to be under a disability only if any impairments are of such severity that a plaintiff is not only unable to do previous work but cannot, considering plaintiff's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person

1 is engaged in substantial gainful activities. If so, benefits are  
2 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
3 not, the decision maker proceeds to step two, which determines  
4 whether plaintiff has a medically severe impairment or combination  
5 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
6 416.920(a)(4)(ii).

7 If plaintiff does not have a severe impairment or combination  
8 of impairments, the disability claim is denied. If the impairment  
9 is severe, the evaluation proceeds to the third step, which  
10 compares plaintiff's impairment with a number of listed  
11 impairments acknowledged by the Commissioner to be so severe as to  
12 preclude substantial gainful activity. 20 C.F.R. §§  
13 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
14 App. 1. If the impairment meets or equals one of the listed  
15 impairments, plaintiff is conclusively presumed to be disabled.  
16 If the impairment is not one conclusively presumed to be  
17 disabling, the evaluation proceeds to the fourth step, which  
18 determines whether the impairment prevents plaintiff from  
19 performing work which was performed in the past. If a plaintiff  
20 is able to perform previous work, that Plaintiff is deemed not  
21 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
22 At this step, plaintiff's residual functional capacity ("RFC")  
23 assessment is considered. If plaintiff cannot perform this work,  
24 the fifth and final step in the process determines whether  
25 plaintiff is able to perform other work in the national economy in  
26 view of plaintiff's residual functional capacity, age, education  
27 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
28 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

1 The initial burden of proof rests upon plaintiff to establish  
2 a *prima facie* case of entitlement to disability benefits.  
3 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
4 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
5 met once plaintiff establishes that a physical or mental  
6 impairment prevents the performance of previous work. The burden  
7 then shifts, at step five, to the Commissioner to show that (1)  
8 plaintiff can perform other substantial gainful activity and (2) a  
9 "significant number of jobs exist in the national economy" which  
10 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
11 Cir. 1984).

#### 12 STANDARD OF REVIEW

13 Congress has provided a limited scope of judicial review of a  
14 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
15 the Commissioner's decision, made through an ALJ, when the  
16 determination is not based on legal error and is supported by  
17 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995  
18 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
19 1999). "The [Commissioner's] determination that a plaintiff is  
20 not disabled will be upheld if the findings of fact are supported  
21 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
22 (9<sup>th</sup> Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence  
23 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
24 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
25 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
26 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
27 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
28 evidence as a reasonable mind might accept as adequate to support

1 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
2 (citations omitted). "[S]uch inferences and conclusions as the  
3 [Commissioner] may reasonably draw from the evidence" will also be  
4 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).  
5 On review, the Court considers the record as a whole, not just the  
6 evidence supporting the decision of the Commissioner. *Weetman v.*  
7 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v.*  
8 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

9 It is the role of the trier of fact, not this Court, to  
10 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
11 evidence supports more than one rational interpretation, the Court  
12 may not substitute its judgment for that of the Commissioner.  
13 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
14 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
15 substantial evidence will still be set aside if the proper legal  
16 standards were not applied in weighing the evidence and making the  
17 decision. *Browner v. Secretary of Health and Human Services*, 839  
18 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
19 evidence to support the administrative findings, or if there is  
20 conflicting evidence that will support a finding of either  
21 disability or nondisability, the finding of the Commissioner is  
22 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
23 1987).

#### 24 **ALJ'S FINDINGS**

25 At the outset, the ALJ found plaintiff met the DIB  
26 requirements and was insured through June 30, 2009. (Tr. 17, 144.)  
27 The ALJ found at step one that although plaintiff earned some  
28 income after onset, he has not engaged in substantial gainful

1 activity. (Tr. 17.) At steps two and three, the ALJ found that  
2 plaintiff suffers from viral myocarditis (inflammation of the  
3 heart), syncope episodes of unknown cause, GERD, morbid obesity,  
4 chest pain of unknown cause, back pain, mild hypertension,  
5 depression, antisocial personality disorder, and polysubstance  
6 abuse in remission, impairments that are severe but which do not  
7 alone or in combination meet or medically equal a Listing  
8 impairment. (Tr. 17-18.) The ALJ found plaintiff less than  
9 completely credible. (Tr. 21.) At step four, relying on the VE,  
10 the ALJ found plaintiff's RFC for a range of light work enables  
11 him to perform his past relevant work as a fast food worker and  
12 electronics inspector. (Tr. 26.) Because the ALJ found at step  
13 four plaintiff can perform past relevant work, step five was  
14 unnecessary. Accordingly, the ALJ found that plaintiff is not  
15 disabled as defined by the Social Security Act. (Tr. 27.)

#### 16 ISSUES

17 Plaintiff contends the Commissioner erred as a matter of law  
18 by failing to (1) properly weigh the medical evidence,  
19 specifically the opinions of examining psychologist W. Scott  
20 Mabee, Ph.D., and testifying expert Rueben Beezy, M.D., and (2)  
21 properly assess his (plaintiff's) credibility. (Ct. Rec. 14 at  
22 12-14, 14-16.) The Commissioner responds that the ALJ's decision  
23 is supported by substantial evidence and free of legal error, and  
24 should therefore be affirmed. (Ct. Rec. 17 at 3.)

#### 25 DISCUSSION

##### 26 A. Weighing medical evidence

27 In social security proceedings, the claimant must prove the  
28 existence of a physical or mental impairment by providing medical

1 evidence consisting of signs, symptoms, and laboratory findings;  
2 the claimant's own statement of symptoms alone will not suffice.  
3 20 C.F.R. § 416.908. The effects of all symptoms must be  
4 evaluated on the basis of a medically determinable impairment  
5 which can be shown to be the cause of the symptoms. 20 C.F.R. §  
6 416.929. Once medical evidence of an underlying impairment has  
7 been shown, medical findings are not required to support the  
8 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d  
9 341, 345 (9<sup>th</sup> Cr. 1991).

10 A treating physician's opinion is given special weight  
11 because of familiarity with the claimant and the claimant's  
12 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9<sup>th</sup>  
13 Cir. 1989). However, the treating physician's opinion is not  
14 "necessarily conclusive as to either a physical condition or the  
15 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
16 751 (9<sup>th</sup> Cir. 1989) (citations omitted). More weight is given to  
17 a treating physician than an examining physician. *Lester v.*  
18 *Cater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). Correspondingly, more  
19 weight is given to the opinions of treating and examining  
20 physicians than to nonexamining physicians. *Benecke v. Barnhart*,  
21 379 F. 3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining  
22 physician's opinions are not contradicted, they can be rejected  
23 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.  
24 If contradicted, the ALJ may reject an opinion if he states  
25 specific, legitimate reasons that are supported by substantial  
26 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44  
27 F. 3d 1435, 1463 (9<sup>th</sup> Cir. 1995).

28 In addition to the testimony of a nonexamining medical



1 advisor, the ALJ must have other evidence to support a decision to  
2 reject the opinion of a treating physician, such as laboratory  
3 test results, contrary reports from examining physicians, and  
4 testimony from the claimant that was inconsistent with the  
5 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
6 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
7 Cir. 1995).

8 *Psychological impairment*

9 Plaintiff contends the ALJ failed to properly credit the  
10 opinion of examining psychologist W. Scott Mabee, Ph.D, that  
11 plaintiff suffers several moderate limitations. (Ct. Rec. 14 at  
12 12-14.) Plaintiff asserts the ALJ's reasons for rejecting Dr.  
13 Mabee's opinion must be specific, legitimate, and supported by  
14 substantial evidence. (Ct. Rec. 14 at 12-13.) The Commissioner,  
15 deeming Dr. Mabee's assessment uncontradicted, asserts the ALJ's  
16 reasons must be "clear and convincing." (Ct. Rec. 17 at 9-10.)  
17 For review purposes, the Court adopts without deciding the more  
18 rigorous standard relied on by the Commissioner.

19 The ALJ discusses plaintiff's psychological profile outlined  
20 in Dr. Mabee's August 13, 2007, evaluation:

21 As for the claimant's mental impairments, the claimant  
22 alleged symptoms of depression and anxiety during a  
23 [DSHS] consultative examination. According to the narrative  
24 report prepared by the consultative examiner, the claimant  
25 perceives others as unsympathetic to his somatic concerns and  
26 unsupportive of his perceived limitations. He has hostility  
27 and suspiciousness toward  
28 others. Her has an unusual amount of concern about physical  
functioning and health matters and probable impairment  
arising from somatic symptoms. He has low self esteem. He  
experiences a moderate amount of sadness and  
physiological disturbances. The claimant describes a  
number of problematic personality traits. He appears  
uncertain about major life issues and has little  
direction or purpose in his life as it currently stands

(Exhibit 6F/10). The claimant occasionally experiences a mild degree of maladaptive behavior. He experiences some degree of anxiety and stress. He reports a personality style that involves a degree of adventurousness, risk-taking, and a tendency to be rather impulsive. The claimant describes himself as a socially isolated individual who has few interpersonal relationships that could be described as close and warm (Exhibit 6F/11).

(Tr. 23.)

The ALJ rejects the opinion:

Nonetheless, the record reflects no actual treatment for this alleged impairment. The claimant has not sought counseling and he is not taking any anti-depressants or anti-anxiety medications (Exhibit 9E/3). This indicates the claimant's symptoms are not significant. Moreover, the MMPI-2 revealed the claimant was over reporting or exaggerating his symptoms and the Personality Assessment Inventory (PAI) suggested the claimant may not have been forthright in his responses (Exhibit 6F/8, 12). Furthermore, when asked about his symptoms of depression at the hearing, the claimant simply stated it is hard to adjust to doing nothing after being used to working. He did not elaborate as to any ongoing symptoms.

(Tr. 23.) Plaintiff alleged two suicide attempts but failed to describe them. The ALJ notes there are no medical records related to any suicide attempt. Accordingly, the ALJ correctly found no evidence of attempted suicide since onset. (Tr. 23.)

To further aid in weighing the conflicting medical evidence, the ALJ evaluated plaintiff's credibility and found him less than fully credible. (Tr. 21.) Credibility determinations bear on evaluations of medical evidence when an ALJ is presented with conflicting medical opinions or inconsistency between a claimant's subjective complaints and diagnosed condition. See *Webb v. Barnhart*, 433 F. 3d 683, 688 (9<sup>th</sup> Cir. 2005).

It is the province of the ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9<sup>th</sup> Cir. 1995). However, the ALJ's findings must be supported by specific

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1 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9<sup>th</sup>  
2 Cir. 1990). Once the claimant produces medical evidence of an  
3 underlying medical impairment, the ALJ may not discredit testimony  
4 as to the severity of an impairment because it is unsupported by  
5 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9<sup>th</sup> Cir.  
6 1998). Absent affirmative evidence of malingering, the ALJ's  
7 reasons for rejecting the claimant's testimony must be "clear and  
8 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9<sup>th</sup> Cir. 1995).  
9 "General findings are insufficient: rather the ALJ must identify  
10 what testimony not credible and what evidence undermines the  
11 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*  
12 *Shalala*, 12 F. 3d 915, 918 (9<sup>th</sup> Cir. 1993).

13 The ALJ relied on several factors when he assessed  
14 credibility: 1) plaintiff's symptoms are relieved with proper  
15 medication; 2) medical records, as well as plaintiff's  
16 descriptions of his activity level in March, August, September and  
17 November of 2007, contradict disabling impairment due to chest  
18 pain or myocarditis; 3) plaintiff's complaints of left leg pain  
19 and numbness, and his back pain, have not been treated with  
20 prescription pain medication. Treatment has been limited to  
21 recommended stretching exercises with no referral to physical  
22 therapy or for evaluation by a specialist; 4) plaintiff was less  
23 than candid about his drug use; and 5) no treating or examining  
24 physician has opined plaintiff is disabled "or even has  
25 limitations greater than those determined in this decision." (Tr.  
26 22, 24-25.)

27 The record supports the ALJ's reasons. In March of 2007,  
28 three months after onset, plaintiff complained of "only occasional

1 chest pain and palpitations if he took his coreg late."

2 Plaintiff's breathing was fine and he was tolerating activity  
3 well. (Tr. 22, referring to Exhibit 9F/1). Records show in August  
4 of 2007 plaintiff had a normal maximal exercise test without  
5 symptoms or EKG change to suggest ischemia. Subsequent tests were  
6 also normal. (Tr. 22, referring to Exhibit 7F/1-2). In March of  
7 2007 plaintiff was doing well and walking daily. In September of  
8 2007, he reported walking one mile with rests. (Tr. 22, referring  
9 to Tr. Exhibits 9F/1, 10F/2.) Plaintiff takes no prescribed pain  
10 medication. (Tr. 22, referring to Tr. 176) (only medications are  
11 crestor for cholesterol and coreg, a blood thinner.)

12 Plaintiff testified he quit using illegal drugs six years  
13 before the hearing. The ALJ observes plaintiff told Dr. Mabee he  
14 last smoked marijuana in May or June of 2007. (Tr. 24, referring  
15 to Tr. 262.)

16 The ALJ's reasons for finding plaintiff less than fully  
17 credible are clear, convincing, and fully supported by the record.  
18 *See Thomas v. Barnhart*, 278 F. 3d 947, 958-959 (9<sup>th</sup> Cir.  
19 2002) (proper factors include inconsistencies in plaintiff's  
20 statements, inconsistencies between statements and conduct, and  
21 extent of daily activities). Noncompliance with medical care or  
22 unexplained or inadequately explained reasons for failing to seek  
23 medical treatment also cast doubt on a claimant's subjective  
24 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.  
25 2d 597, 603 (9<sup>th</sup> Cir. 1989).

26 The ALJ observes Dr. Mabee opined plaintiff was moderately  
27 limited in all areas of social functioning. (Tr. 25, referring to  
28 Exhibit 6F.) The ALJ rejected the opinion because plaintiff had no

1 treatment, and took no medication for, any psychological  
2 impairment after onset (Tr. 23), leading to the conclusion any  
3 symptoms are not significant. The record supports the ALJ's  
4 reason.

5 The ALJ correctly notes results on two tests showed plaintiff  
6 exaggerated, over reported symptoms, or was less than forthright.  
7 (Tr. 23,25 referring to Exhibit 6F/8, 12.) The ALJ found  
8 significant plaintiff's lack of testimony describing any ongoing  
9 psychological symptoms. Dr. Mabee's assessed limitations appear  
10 based on plaintiff's unreliable self report. (Tr. 25.) These are  
11 clear and convincing reasons for rejecting Dr. Mabee's assessed  
12 social functioning limitation. See *Bayliss v. Barnhart*, 427 F.3d  
13 1211,1216 (9<sup>th</sup> Cir. 2005).

14 The Commissioner opines any error by the ALJ's rejection of  
15 Dr. Mabee's assessment is harmless because the ALJ accounted for  
16 some moderate limitations in social functioning in plaintiff's  
17 RFC. (Ct. Rec. 17 at 11-12.) The ALJ indicates plaintiff would  
18 work best at a job with perfunctory social interactions. (Tr. 20,  
19 23.) The Commissioner is correct. A mistake that is  
20 "nonprejudicial to the claimant or irrelevant to the ALJ's  
21 ultimate disability conclusion" is harmless error. *Stout v.*  
22 *Comm'r. Soc. Sec. Admin.*, 454 F.3d 1050,1052 (9<sup>th</sup> Cir. 2006).

23 The ALJ is responsible for reviewing the evidence and  
24 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
25 *Bowen*, 881 F. 2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
26 trier of fact, not this court, to resolve conflicts in evidence.  
27 *Richardson*, 402 U.S. at 400. The court has a limited role in  
28 determining whether the ALJ's decision is supported by substantial

1 evidence and may not substitute its own judgment for that of the  
2 ALJ, even if it might justifiably have reached a different result  
3 upon de novo review. 42 U.S.C. § 405 (g).

4 *Physical impairments - ME' 's testimony*

5 Plaintiff alleges the ALJ erred when he assessed an RFC for  
6 light work "by relying on the testimony of [medical expert] Dr.  
7 Beezy." (Ct. Rec. 14 at 14.) Plaintiff contends the medical  
8 records clearly support the physical impairments of viral  
9 myocraditis, syncope, GERD, obesity, chest and back pain, and  
10 hypertension. He alleges his impairments cause fatigue, as well as  
11 the need to lie down six times daily for 30-45 minutes "to calm  
12 his heartbeat." (Ct. Rec. 14 at 15.) The Commissioner responds  
13 the ALJ properly assessed the RFC based on plaintiff's  
14 credibility, the medical record, and Dr. Beezy's testimony. (Ct.  
15 Rec. 17 at 12-18.)

16 The Commissioner is correct. Plaintiff's viral myocarditis  
17 had resolved with proper medication, according to Dr. Breezy's  
18 testimony and plaintiff's statements to treatment providers. The  
19 ALJ notes treating physician Pavel Conovalciuc, M.D. opined  
20 plaintiff's exercise endurance is not largely compromised by his  
21 heart condition. (Tr. 22,25; Tr. 285,291, 307-308.)

22 Complaints of disabling back pain are contradicted by minimal  
23 objective findings (Tr. 311), full range of motion on examination  
24 (Tr. 306), no major back abnormalities noted during Dr.  
25 Conovalciuc's examination, and treatment consisting of tylenol and  
26 recommended stretching exercises (Tr. 305-306). (Tr. 21-22, 25.)

27 The ALJ points out plaintiff's GERD is controlled with an  
28 over-the-counter remedy and he takes no medication for

1 hypertension. (Tr. 22.) Plaintiff first reported syncope episodes  
2 of unknown origin in July of 2007, six months after onset. (Tr.  
3 22 referring to Exhibit 7F/3.) Plaintiff complained of ongoing  
4 dizzy spells and chest pain in September of 2007, but the ALJ  
5 observes he was able to walk one mile at the time with rest  
6 breaks. (Tr. 22.) There is no evidence plaintiff has been  
7 disabled by fainting spells for the requisite twelve month period.  
8 The ALJ considered obesity. Plaintiff lost nearly 30 pounds by the  
9 hearing. (Tr. 22-23.) The ALJ concludes, based on the record,  
10 this impairment alone or in combination would not prevent  
11 plaintiff from performing a range of light work. As indicated,  
12 the ALJ observes no treatment provider has opined plaintiff is  
13 disabled or unable to perform light work. (Tr. 24.)

14 With respect to substance abuse, because the ALJ found  
15 plaintiff not disabled, no further analysis was required.

16 After review the Court finds the ALJ's assessment of the  
17 medical evidence and of plaintiff's credibility are supported by  
18 the record and free of legal error.

19 **CONCLUSION**

20 Having reviewed the record and the ALJ's conclusions, this  
21 court finds that the ALJ's decision is free of legal error and  
22 supported by substantial evidence..

23 **IT IS ORDERED:**

24 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is  
25 **GRANTED.**

26 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is  
27 **DENIED.**

28 The District Court Executive is directed to file this Order,

1 provide copies to counsel for Plaintiff and Defendant, enter  
2 judgment in favor of Defendant, and **CLOSE** this file.

3 DATED this 9th day of November, 2009.

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s/ James P. Hutton

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JAMES P. HUTTON

UNITED STATES MAGISTRATE JUDGE

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